Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	
of Satellite Earth Stations	)	CS Docket No. 96-83

COMMENTS OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Introduction and Summary

The National Association of Home Builders (NAHB) is a trade association representing the nation's housing industry. NAHB's 185,000 member firms are engaged in all aspects of real estate development, ownership and management and include owners and managers of apartment buildings, condominiums, cooperatives, and community associations. NAHB, through its Multifamily Council, filed comments on April 15, 1996, opposing the Commission's original proposal. NAHB again urges the Commission not to adopt any rule that would require owners of multiunit properties to accept placement on their property of antennas owned by tenants, residents, or telecommunications providers. Any such rule amounts to an unconstitutional taking of private property.

In its Further Notice of Proposed Rulemaking of August 6, 1996, the Commission requested comments on the question of whether adoption of a prohibition applicable to restrictions imposed on rental property or property not within the exclusive control of the viewer who has an ownership interest would constitute a taking for which compensation would be

required, and if so, what constitutes just compensation. The Commission has also requested comments on the specific practical problems that would result from an order prohibiting such restrictions.

NAHB submits that any order by the Commission that would require building owners to allow placement of over- the- air reception devices on rental or commonly owned property would constitute a taking for which compensation would be required. Affected property owners would be constitutionally entitled to compensation measured against fair market value. In addition to violating the takings prohibition set forth in the Fifth Amendment to the U.S. Constitution, there are practical considerations which dictate against adoption of the Commission's proposal. Any attempt to remove private restrictions on placement of telecommunications equipment on rental or commonly owned property would adversely affect building management. Structural and safety considerations dictate that the building management, not individual residents, maintain control over common elements.

NAHB further submits that Section 207 of the Telecommunications Act does not confer jurisdiction on the Commission to regulate the placement of telecommunications equipment on rental property or commonly owned property. For these reasons, NAHB urges the Commission not to adopt any rule that would allow placement of such equipment on rental property or on property not within the exclusive control of a viewer who has an ownership interest.

DISCUSSION

I. Commission Mandated Access to Rental and Commonly Owned Property Amounts to a Taking in Violation of the Fifth Amendment of the U.S. Constitution

In light of the decision of the U.S. Supreme Court in Loretto v.Teleprompter Manhattan CATV Corporation 458 U.S. 419 (1982) there is no question that any order by the Commission requiring rental property owners or operators of commonly owned property to allow placement of antennas and associated equipment in or on the building by residents or telecommunications providers would constitute a taking of private property in violation of the Fifth Amendment of the U.S. Constitution for which just compensation would be required. The Loretto Court clearly stated that a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve. Id. at 426.

At issue in the Loretto case was a New York statute that provided that a landlord must permit a cable television (CATV) company to install its CATV facilities on his property and further, that the landlord could not demand compensation in excess of the amount determined to be reasonable by a State Commission. The access statute was adopted to facilitate tenant access to CATV. The appellant had purchased a 5-story apartment building and discovered that the appellee cable company had installed cables on the building for serving tenants and residents in other buildings. Appellant sued the cable company claiming the installation of cables constituted a taking of private property without just compensation.

In reaching its decision, the Court did not question the determination of the New York Court of Appeals that the statute in question served a legitimate public purpose in promoting the development of cable television. However, the Court stated that the proper inquiry is not the public interests that are served by the regulation, but rather, whether an otherwise valid

regulation so frustrates property rights that compensation must be paid. Id. at 425.

The Commission's proposal would require the placement of over-the-air reception devices on rental or commonly owned property. Clearly, this amounts to a physical occupation of property. The access contemplated by the Commission is no different from the method of intrusion in the Loretto case. In Loretto, the installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." Id. at 438. This is the same type of attachment that would occur under the Commission's proposal as satellite antennas would have to be bolted and screwed onto the building's roof or other common area. The size of the affected area is Constitutionally irrelevant. In Loretto, supra, at 436-37, the Court reaffirmed that the "rights of private property cannot be made to depend on the size of the area permanently occupied."

Where the "character of the governmental action" is a permanent physical occupation of property, the Supreme Court has uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Loretto at 434-435, citing Penn Central Transportation Co. v. New York City 438 U.S. 104, 124 (1978). Indeed, this was reiterated once again by the Court in 1992 when it characterized such actions as *per se* takings requiring the payment of just compensation without inquiry into the government's purpose. Lucas v. South Carolina Coastal Council 503 U.S. 1003 (1992).

In Bell Atlantic v. Federal Communications Commission 24 F.3d 1441 (D.C. Cir. 1994), local telephone exchange companies were ordered by the FCC to permit competitive access

providers to connect their facilities to local exchange carrier networks through physical colocation. This meant that the local exchange carrier had to turn over space within its central office so that the competitive access provider could install and operate its circuit terminating equipment. The FCC based its orders on broad language in the Communications Act authorizing the FCC to order carriers to "establish physical connections with other carriers."

The Court of Appeals held that the FCC orders directly implicated the Just Compensation Clause of the Fifth Amendment. Id. at 1445. The court noted that while the clause prohibits only uncompensated takings, precedent instructs that the policy of avoiding constitutional questions should take effect when there is an "identifiable class of cases in which application of a statute will necessarily constitute a taking." Bell Atlantic, supra, citing U.S. v. Riverside Bayview Homes Inc. 474 U.S. 121, 128 n.5 (1985). The court made clear that where administrative interpretation of a statute creates such a class, a narrow construction of the law is necessary to prevent encroachment on Congress' exclusive powers to raise revenue and to appropriate funds.

The Bell Atlantic court rejected the traditional deference accorded agency interpretations of a statute it administers as required by the Supreme Court in Chevron v. NRDC 487 U.S. 837 (1984) on the grounds that deference to agency action that creates a broad class of takings claims would allow agencies to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U.S. Treasury. The court found that the FCC's physical colocation orders constituted a taking of private property, and held that the FCC had no clear authority to order such a taking. Therefore, the Court vacated the orders requiring colocation. Bell Atlantic, supra, at 1447.

As in the Bell Atlantic case, if the Commission were to require property owners to allow the installation of satellite antennas on rental or commonly owned property, the Commission would be requiring owners to suffer the physical occupation of their property by others. There is no doubt that this would amount to a *per se* taking under Loretto and Lucas. Given the lack of any clear intent by Congress in Section 207 of the Telecommunications Act to provide the Commission with authority to effect a taking, a court is unlikely to uphold the authority of the Commission to issue rules that effect a taking of private property, thereby subjecting the U.S. Treasury to unlimited liability for just compensation.

In its Further Notice of Proposed Rulemaking, the Commission noted that the Loretto Court stated in dicta that "a different question" might be presented if the statute at issue required the landlord to install cable upon the tenant's request, instead of requiring that the landlord permit installation of such equipment by a third party. This statement has no relevance to the proposed rulemaking. To read such language to infer that there would not be a taking if the Commission required landlords to install satellite antennas on rental property at the tenant's request rather than requiring that landlords permit the installation of such devices by third parties is misleading. In both situations, a physical invasion of private property occurs by reason of a government action constituting a *per se* taking as described in Lucas, Loretto and countless other cases issued by state and federal courts over the past decade. Even if requiring landlords to install equipment doest not amount to a *per se* taking, such a requirement would certainly amount to a regulatory taking. Penn Central Transportation Co. v. New York City 438 U.S. 104 (1978). Finally, in the unlikely event that such a requirement were held not to be a taking, the question is of no import here since Section 207 does not give the Commission the authority to

order property owners to install satellite antennas on rental or commonly owned property. Therefore, the Commission cannot avoid the takings issue by crafting an order that directs owners to install the equipment.

II. Just Compensation for the Taking Requires Assessment of Fair Market Value

Given that any Commission order requiring property owners to accept placement of satellite antennas on rental and commonly owned property would amount to a taking of private property in violation of the Takings Clause of the U.S. Constitution, the issue of just compensation must be addressed. The affected property owner is constitutionally entitled to compensation measured against fair market value. Penn Central Transportation Co. v. New York City 438 U.S. 104 (1978).

Given the diversity of buildings that could be affected by the proposed rule, and the fact that each building could suffer different types of damages, there is no way to determine what would constitute just compensation in a consistent and fair manner. Ascertainment of the market value of each affected building would have to be done on a case-by-case basis. The fact that there is no method for computing just compensation in this matter other than on a building-by-building basis supports the position that the Commission's proposal is unwarranted and unwise as a matter of public policy. Neither the Commission nor the courts have the capacity to make the assessments necessary to determine market values of the properties that will be affected by this proposed rule.

III. **The Commission Lacks Statutory Authority to Preempt All Private Restrictions on the Placement of Satellite Antennas**

Section 207 of the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56) provides in its entirety:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

It is well established that if the statutory language makes the intent of Congress clear and unambiguous, courts must give full effect to that intent. Mosquera-Perez v. INS 3 F.3d 553 (1st Cir. 1993). When the language of the statute is ambiguous, courts will look beyond the words of the statute to its history, policy, or other extrinsic aids to ascertain statutory intent. Acacia Motors Inc. v. Ford Motor Co. 44 F.3d 1050 (1st Cir. 1995).

The legislative history of Section 207 indicates that this section was unchanged from the House bill, H.R. 1555, Section 308. In the House Report accompanying H.R. 1555, the Committee on Commerce indicated that Section 308 was "... intended to preempt enforcement of State or local statutes or regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennas designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to zoning laws, ordinances, **restrictive covenants, or homeowners' association rules**, shall be unenforceable to the extent contrary to this section." (Emphasis added.) House Report 104-204, July 24, 1995, pp. 123-124.

This language does not evince any intent to apply this provision to rental property or

commonly-owned property. References to "restrictive covenants" and "homeowners association policies" clearly indicates that Congress was concerned with property that the viewer owns and over which the viewer exercises exclusive control since such terms are generally understood to apply to single family properties, not multiunit properties such as apartment buildings. Thus, the only fair reading of Section 207 is that it reaches only those restrictions that limit a viewer's right to install an antenna on property that the viewer owns and over which the viewer exercises control.

The absence of any specific language in Section 207 or in the legislative history of the Telecommunications Act of 1996 indicating intent to cover apartment buildings, cooperatives, condominiums and similar multiunit buildings cannot be minimized. Where Congress intended that a particular provision apply to multiunit properties, it specifically included language to that effect in the legislation. See Cable Investments v. Wooley 867 F.2d 151 (3rd Cir. 1989).

In the Cable Investments case, a cable television company brought an action against a landlord that refused to permit the cable company to enter its building to provide cable service to residents in the building. The cable company claimed that the Cable Communications Act of 1984, 47 U.S.C. 521 et seq. (Cable Act) gave it the right of access to multiunit dwellings.

Because of the ambiguity of the Cable Act on this issue, the court referred to the legislative history. The court noted that the original House bill did contain language that specifically provided for mandatory access in a multiple unit residential or commercial dwelling and provided for just compensation for property owners. Cable Investments v. Wooley, supra, at 155-156. However, such mandatory access and just compensation language was dropped from the bill that was ultimately passed by Congress. Therefore, the court concluded that Congress

did not intend cable companies to have access to individual units in apartment buildings. Id. at 156.

This case demonstrates that Congress knows how to address the issue of mandatory access to multiunit properties. When it chooses to provide for such access, it provides clear language to that effect. The fact that Section 207 of the Telecommunications Act of 1996 does not clearly address multiunit properties combined with the fact that nothing in that section's legislative history addresses the issue of removing restrictions adopted by multiunit property owners or the issue of just compensation demonstrates that Congress did not intend Section 207 to apply to these types of properties.

In reaching its decision in the Cable Investments case, the court noted that it was guided by the principle of interpreting a statute when possible to avoid raising constitutional questions. Id. at 159. This should also be the Commission's guiding principle as it develops a final rule in this matter.

IV. **There are Practical Reasons That Dictate Against Application of Section 207 to Rental and Commonly Owned Property**

It is unwise as a matter of public policy to extend Section 207 to apply to rental or commonly owned property. Furthermore, there are practical reasons why Section 207 should not be extended to such properties. Effective property management requires that a building owner and manager have complete control over the management and operation of the building. If the Commission were to adopt the proposed rule, building owners and managers would not be able to effectively control the operation of the building. This means that the building could suffer serious damage, and building residents could not be assured a safe living environment. Surely,

this is not what Congress intended when it enacted Section 207.

A. **Building Maintenance Considerations**

The installation of an antenna on a building roof can create serious building maintenance issues. Drilling holes in a roof to mount an antenna could result in leaks if not properly done. Such leaks could result in water damage to the building, and such water damage could affect individual dwelling units including units occupied by other than those contracting for the services. Any resulting damage is the landlord's responsibility to repair.

Physical damage to the building could also result from improper mechanical connection of the satellite to the roof. Screws and other fasteners could damage the brick, siding, roofing, or window trim. There is no way to insure quality installation of such equipment if every resident is free to hire his or her own contractor to install an antenna. If damage to the building results from improper installation, the building owner will be responsible to repair such damage, even though the building owner was not responsible for creating the problem.

The wire from the satellite antenna must enter the dwelling unit at some point and this cannot be done without entering through a door, window, wall, or roof. If the wire is run through a door or window, then that door will not seal properly against air or water. The only other alternative is to penetrate the roof or exterior wall. Such attachments create new maintenance and repair costs that will ultimately fall on the owner.

B. **Safety Considerations**

Improper installation of satellite antennas could lead to safety hazards and building code violations. An improperly installed antenna could be blown off its mounting and cause personal injuries to bystanders or residents, and property damage to vehicles, personal property, or other

buildings.

Building owners cannot ensure compliance with building code or fire code requirements if they cannot control who comes onto their building to place equipment on the building. Fire codes require that certain elements of a building such as walls, floors and shafts provide certain levels of fire resistance based on factors such as type of construction and building height. Other building codes specify that a building must meet certain insulating characteristics, grounding clearances, etc. A technician who installs telecommunications equipment will most likely not know all the code requirements for a particular building. Again, any violation of the code will be the responsibility of the owner even though the owner had no responsibility for creating the violation.

C. **Occupant Security**

Building owners and managers are responsible for ensuring the safety of residents. However, building owners and managers will not be able to ensure safety in the buildings they operate if they cannot control who is coming onto the premises. In effect, the Commission's proposal would grant an uncontrolled right of access to telecommunications service personnel. Such personnel may violate security procedures by leaving doors open or admitting unauthorized persons. If such personnel commit criminal acts themselves, the building owner potentially will face liability even though the building owner had no relationship with or control over such persons.

D. **Aesthetic Considerations**

The Commission's proposal raises aesthetic concerns that cannot be dismissed as a trivial issue. A building that has satellite antennas all over the roof is more unsightly than a building

that has no such visible equipment. Most people prefer to live in attractive buildings. If a building is cluttered with satellite antennas it will be harder to attract residents. This means that building owners could lose revenue as residents choose other buildings that do not have a cluttered look. Property values could also decrease because of a building's loss of attractiveness. Building owners do everything they can to ensure the desirability of their property to attract and maintain residents. The Commission's proposal interferes with the owner's ability to maintain an attractive building, and therefore threatens the owner's ability to attract residents and ultimately threatens an owner's economic investment.

In summary, the building management is the only entity with the incentive to protect the interests of all residents of the building. Individual residents are only concerned with the service they receive, and service providers are only concerned with the service they provide to their customers. If individual residents are allowed to place satellite antennas on rental or commonly owned property, building management will be presented with a host of problems relating to building security and maintenance. Adoption of the proposed rule threatens the effective management of multiunit residential properties, and also threatens the livelihood of the nation's multi housing providers. Common sense dictates against adoption of a rule preempting private restrictions on placement of satellite antennas on rental or commonly owned property.

V. A Rule Preempting Restrictions on Placement of Satellite Antennas on Rental and Commonly Owned Property Would Conflict With Established Property Law Principles

It would be unwise as a matter of public policy for the Commission to adopt a rule that would preempt private restrictions on the placement of satellite antennas on rental and commonly owned property because such a rule would conflict with established property law principles.

Under traditional landlord/tenant law, a tenant acquires the right to exclusive occupancy of the leased premises, and as incident thereto, parts of the structure that form an integral part of the leased premises. Bentley v. Dynarski 186 A.2d 791 (Conn. 1962).

In the absence of an express provision, a lease does not give a tenant the right to use any portion of the walls of the building other than the walls of his own premises. 51C C.J.S. *Landlord and Tenant* Section 292 (1968). It is practically unanimous that a lease of a specific part of a building does not include the roof unless specifically stated. Marck v. Gettler 89 N.E.2d 181 (Ohio 1949). Where there is a common roof over premises occupied by a landlord and tenants, or by different tenants, ordinarily the part of the roof covering the portion leased to one tenant is not included in the lease, but remains in control of the landlord. 51C C.J.S. *Landlord and Tenant* Section 292 (1968). Thus, it is clear that any Commission rule that preempts restrictions on placement of satellite antennas on the roof of apartment buildings will upset the well established landlord/tenant relationship.

The primary distinguishing feature between condominium and cooperative owners and individual owners of property is that the former have shared responsibilities with other owners that individual owners such as single family homeowners do not have.

A condominium is an estate in real property consisting of a separate interest in a residential building on such property together with an undivided interest in common in other portions of the same property. In a condominium, each unit owner holds a separate interest in his or her unit, and an interest as a tenant-in-common with other owners in the common areas. In a cooperative project, an entity such as a corporation owns the units and the common areas, and individuals purchase shares in the corporation which gives them the right to lease their

individual units from the corporation. They pay periodic costs of their individual leases, together with respective shares of overhead for the entire facility. Thompson on Real Property Vol. 4, Chapter 36 (Thomas Ed. 1994).

Requirements for the establishment of a condominium are usually set out in state statutes. The condominium association runs the common affairs of the condominium, and is responsible for the maintenance of the common elements of the condominium. It is required to repair and reconstruct damaged or destroyed portions of the common areas. Operation and maintenance expenses of the common elements are common expenses to be assessed pro rata against each unit owner. 31 C.J.S. *Estates* Section 150 (1996).

The undivided interest in the common elements of the condominium requires that the consent of all the unit owners is necessary to effect changes in the common elements. Penney v. Assn. Of Apt. Owners of Hale Kaanapali 776 P. 2d 393 (Hawaii 1989). Thus, any Commission rule that would essentially allow individual unit owners to unilaterally place a satellite antenna on the roof or other common area of a condominium would run contrary to established law in this area and will upset the smooth operation of condominium and cooperative communities.

There is no doubt that any rule adopted by the Commission that would prevent multiunit building owners from restricting the placement of satellite antennas on rental or commonly owned property will have a serious negative effect on such properties and will only create confusion as owners, management associations, and residents struggle to define their rights and responsibilities. In adopting a final rule, the Commission should be mindful of established property law principles, and should not adopt any rule that conflicts with such long standing tradition.

Conclusion

There are sound public policy reasons why the Commission should not adopt a rule that would prohibit owners and managers of multiunit properties from controlling the placement of satellite antennas on such properties. Furthermore, Section 207 does not confer authority on the Commission to adopt such a rule. For the reasons stated herein, NAHB respectfully urges the Commission not to adopt any rule that would require owners of multiunit properties to accept placement on their property of satellite antennas owned by tenants, residents, or telecommunications providers.

Respectfully submitted,

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